

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition	:	
of	:	
OGGI RESTAURANT, INC.	:	ORDER
	:	DTA NO. 810572
for Revision of a Determination or for Refund	:	
of Sales and Use Taxes under Articles 28 and 29	:	
of the Tax Law for the Period March 1, 1981	:	
through February 29, 1984.	:	

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Petitioner, Oggi Restaurant, Inc., 551 Fifth Avenue, New York, New York 10017, has moved for a default determination pursuant to 20 NYCRR 3000.4(a)(4).<sup>1</sup> The Division of Taxation opposes such motion, and has also cross-moved to dismiss the petition as untimely, pursuant to 20 NYCRR 3000.5(b)(1)(ii). Petitioner opposes such cross motion. Petitioner appeared by John R. Serpico, Esq. The Division of Taxation appeared by William F. Collins, Esq. (Vera R. Johnson, Esq., of counsel).

After due consideration of the moving papers, attached supporting documents, and pleadings Dennis M. Galliher, Administrative Law Judge, renders the following order.

FINDINGS OF FACT

Petitioner, Oggi Restaurant, Inc., operated during the period March 1, 1981 through February 29, 1984, and through the present, a restaurant located at 1606 First Avenue, New York, New York.

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<sup>1</sup>The motion papers herein caption petitioners/movants as Oggi Restaurant, Inc., Ernest Vogliano, and David Zoni. The two named individuals are involved as officers of the corporate petitioner. Notices of determination, petitions and answers were issued to and/or filed in the names of all three such parties. However, since only the corporate petitioner has filed a power of attorney authorizing Mr. Serpico as representative, this order mentions only such corporate petitioner as a party hereto.

Following an audit, the Division of Taxation ("Division") issued to petitioner a Notice of Determination and Demand for Payment of Sales and Use Taxes Due for the period March 1, 1981 through February 29, 1984 in the amount of \$85,781.44, plus penalty and interest. This notice, bearing assessment number S850529143C, is dated May 29, 1985 on its face.

A petition was filed by Oggi Restaurant, Inc. challenging the above-described notice. The petition form, designated Form TA-11 with a July 1984 print date, was the form utilized by the Tax Appeals Bureau of the former State Tax Commission.<sup>2</sup> The petition specifically protests assessment number S850529143C, is signed by petitioner's former representative, James Stevralia, Esq., and is dated June 25, 1985. This petition bears two indate stamps, to wit, an October 17, 1985 indate stamp by the former Tax Appeals Bureau and a March 3, 1992 indate stamp by the Division of Tax Appeals.

Included in the Division of Tax Appeals' case file are two power of attorney forms. One appoints petitioner's former representative, James Stevralia. It is signed, dated, witnessed and acknowledged on May 9, 1984. The petition itself lists James Stevralia as petitioner's representative and notes, via a checkbox on its face, that a power of attorney is attached.

The second power of attorney appoints petitioner's current representative, John R. Serpico, Esq., and is dated and witnessed on February 25, 1992 (petitioner's current representative signed this power of attorney as one of the witnesses thereto).

By a letter dated February 27, 1992, petitioner's current representative requested that the Division's attorney forward to him a copy of the Division's answer to the petition and also assist in obtaining copies of audit workpapers. This letter bears a Law Bureau indate stamp of March 2, 1992 and a Division of Tax Appeals indate stamp of March 3, 1992.

By a letter dated March 10, 1992, the Division of Tax Appeals acknowledged receipt of

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<sup>2</sup>The administrative adjudicatory functions of the former State Tax Commission and its Tax Appeals Bureau were passed to the Division of Tax Appeals which commenced operations as of September 1, 1987.

the petition at issue herein.

The Division responded to the foregoing correspondence via the filing of an answer, dated May 8, 1992, accompanied by a cover letter dated May 11, 1992.

On September 21, 1992, the Division of Tax Appeals received petitioner's Notice of Motion, dated August 5, 1992, together with a supporting affirmation, an affidavit and other documents. By this motion, petitioner seeks an order holding the Division of Taxation in default for failure to have timely filed an answer to the petition.<sup>3</sup>

Petitioner's motion for default is premised upon the position that the Division's answer was not served within 60 days of either (a) the June 25, 1985 date the petition was signed and allegedly mailed or, (b) the October 17, 1985 Tax Appeals Bureau indate stamp appearing on the face of

the petition. Rather, petitioner claims (and the Division does not dispute) that the answer was not filed until May 11, 1992. Petitioner, in turn, claims that such delay of nearly seven years has prejudiced its ability to prepare and present its case due to changes in petitioner's operation and personnel. More specifically, petitioner claims the death of a bartender at the restaurant and other staff changes leave the location of potential witnesses either impossible or nearly impossible. Petitioner also points to the passage of time as leading to unwarranted and unjustified accrual of additional penalty and interest charges.

On September 11, 1992, the Division filed an affidavit in opposition to petitioner's motion. By this affidavit, the Division alleges that its answer was timely filed on May 11, 1992, which was within 60 days of the March 10, 1992 date the petition was acknowledged as

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<sup>3</sup>It appears that while the moving papers were not filed with the Division of Tax Appeals until September 21, 1992, the same were filed with the Division of Taxation on or about August 6, 1992.

received in proper form by the Division of Tax Appeals.<sup>4</sup> For its position, the Division cites to 20 NYCRR 3000.4(a)(1) which calls for the service of an answer within 60 days from the date the Supervising Administrative Law Judge acknowledges receipt of the petition in proper form. The Division also argues that the regulations of the former State Tax Commission, specifically at 20 NYCRR former 601.6(a)(1), called for service of an answer within 60 days from the date the Secretary (to the Commission) acknowledged receipt of an acceptable perfected petition. The Division argues that there is no evidence that a perfected petition was acknowledged as filed with the former State Tax Commission or that the petition was "deemed" perfected. The Division therefore argues that its time period within which to file an

answer did not commence to run until the March 10, 1992 acknowledgement from the Division of Tax Appeals. The Division also maintains that the 60-day requirement for filing an answer has been held to be directory as opposed to mandatory (citing Santoro v. State Tax Commn., Sup Ct, Albany County, January 4, 1979, Conway, J.). Finally, the Division argues that petitioner's allegation of prejudice is unsubstantiated, noting that petitioner raised no inquiries concerning the case until several years had passed.

On October 20, 1992, the Division filed a Notice of Cross Motion with supporting papers seeking an order dismissing the petition as not having been timely filed.

Included in support of the Division's cross-motion is an affidavit made by one Michael Sampone, who served as Tax Audit Administrator of the Division's District Office Audit Bureau's ("DOAB") sales tax section before, during and after the period in question. This affidavit describes with specificity the process involved in the preparation and mailing of notices of determination. The affidavit notes that all notices of determination are, as required by the Tax Law, sent via certified mail. This affidavit describes the preparation of notices of determination by sales tax section clerks, together with the simultaneous preparation of a

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<sup>4</sup>The sixtieth day after March 10, 1992 was May 9, 1992, a Saturday.

certified mailing record consisting of a U.S. Postal Service Form 3877 ("P.S. Form 3877") and a Division Form AU-372.1. The certified mailing record lists those taxpayers to whom notices of determination are being mailed and also includes for each such notice a separate certified control number. The affidavit describes the assignment of sequential certified control numbers for each notice on the certified mailing record, followed by deposit of the notices and the certified mailing record in the DOAB's sales tax section outgoing mail basket for pick-up by personnel from the Division's mail and supply section ("mailroom").

The Sampone affidavit explains that after acceptance of the notices of determination by the United States Postal Service, the mailroom employee returns to the DOAB a copy of the certified mailing record, including an attestation by the mailroom employees involved certifying that the notices described, enclosed in sealed, postpaid envelopes, were deposited with and accepted by the United States Postal Service. Attached to the affidavit were, inter alia, a copy of the notice of determination issued to petitioner and a copy of the certified mailing record consisting of the Form AU-372.1 and the P.S. Form 3877. The P.S. Form 3877 lists, inter alia, the total number of articles received by the Postal Service, the certified control numbers assigned to the articles, the names and addresses of the taxpayer addressees,<sup>5</sup> the amount of postage affixed, and the certified mailing fee for each article, including, specifically, the notice at issue herein. The affidavit notes that the P.S. Form 3877 column labeled "handling charge" actually reflects the last four characters of each of the notices of determination being mailed by certified mail. The P.S. Form 3877 reflects a United States Postal Service postmark stamp date of May 29, 1985 and also includes the initials of the Postal Service employee accepting the notices for mailing.

The total dollar amount of tax, penalty and interest shown as assessed against petitioner on the notice of determination as well as the

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<sup>5</sup>The names of taxpayers other than petitioner herein have been redacted for purposes of compliance with statutory privacy requirements.

notice number and petitioner's identification number and name match such numbers/items as shown on the Division's Form AU-372.1. The Form AU-372.1, titled a "Mailing Record - Notice of Determination", is dated May 29, 1985 on its face. On its reverse side, this form is also dated May 29, 1985 and includes a witnessed statement by one Frances Rubenstein attesting to the May 29, 1985 delivery of the notices, including the subject notice, from the DOAB to the Division mailroom where Ms. Rubenstein witnessed the sealing and stamping of the envelopes in which the notices were enclosed. An additional witnessed statement by one T. C. Paley describes the May 29, 1985 deposit of such notices, enclosed in sealed, postpaid envelopes, with the United States Postal Service at Albany, New York.

In addition to the foregoing, the Division's motion papers include an affidavit made by one Daniel D. Lafar, a Principal Mail and Supply Clerk employed in the Division's mailroom before, during and after the period in question. This affidavit also details the established procedure by which notices of determination are retrieved from the DOAB's sales tax section outgoing mail basket and transported to the mailroom for insertion in envelopes, affixation of proper postage and delivery to the United States Postal Service. This affidavit includes and makes reference to the same documents (the notice and certified mail record) as are attached to the Sampone affidavit. Each of the affiants described above concludes, based on his or her review of the described documents and knowledge of Division office procedures, that the notices in question were mailed to petitioner on May 29, 1985.

On November 9, 1992, petitioner filed an affirmation in opposition to the Division's cross motion to dismiss. Petitioner first argues that the cross motion is inappropriate procedurally, specifically because the cross motion was filed subsequent to the filing of all papers concerning petitioner's motion for default. Petitioner also maintains that the Division's answer does not allege the petition was not timely filed. Accordingly, petitioner argues that the Division has waived such issue and is barred from raising the same.

Petitioner raises no challenge to the Division's claim of proper mailing of the subject notice on May 29, 1985, nor is receipt thereof disputed. Rather, petitioner argues that a petition

in response to the notice was timely filed, allegedly on June 25, 1985, as described hereinafter.

Included as part of petitioner's affirmation in opposition to the cross motion is an affidavit made by petitioner's former representative, James Stevralia. This affidavit, dated November 5, 1992, describes Mr. Stevralia's involvement in preparing the petition with regard to the matter at issue. After review of computerized time records maintained by the law firm by which he is employed, Mr. Stevralia describes the following activities with respect to preparation and filing of the petition in question:

- (a) On June 10, 1985, Mr. Stevralia prepared a petition to the Tax Appeals Bureau in response to the notice of determination at issue herein.
- (b) On June 11, 1985, Mr. Stevralia prepared and sent power of attorney forms to petitioner's shareholders to be signed by them for filing with the petition.
- (c) On June 19, 1985 the power of attorney forms, executed and witnessed, were returned to Mr. Stevralia.
- (d) On June 25, 1985, Mr. Stevralia signed the petition and, on the same date, mailed the petition together with the completed power of attorney forms to the former State Tax Commission.

The computerized time records attached to Mr. Stevralia's November 5, 1992 affidavit reveal the following entries for the above-described dates:<sup>6</sup>

<u>Date</u>	<u>Time</u>	<u>Description</u>
6/10/85	1 hr.	"tax planning - sales tax petition"
6/11/85	1/4 hr.	"tax return OGGI - sales tax audit"
6/25/85	1 hr.	"tax return OGGI - protest"

Additional computerized records regarding disbursements reflect no entries on the dates listed above, nor do they list any entry for "postage expense" on or near June 25, 1985.

The power of attorney form appointing Mr. Stevralia to be petitioner's representative, as attached to his November 5, 1992 affidavit, is signed, dated and acknowledged June 19, 1985 (consistent with the affidavit claim). By contrast, the power of attorney form appointing Mr. Stevralia, as attached to the petition, is signed, dated, witnessed and acknowledged on

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<sup>6</sup>There is no June 19, 1985 entry on the time records noting return of the executed power of attorney forms to Mr. Stevralia.

May 9, 1984 (see Finding of Fact "4").

Included as part of petitioner's motion papers herein was another affidavit made by Mr. Stevralia. This affidavit is dated September 22, 1992 and accompanies petitioner's reply affirmation on its motion for default. Mr. Stevralia's September 22, 1992 affidavit states, at paragraph "2", that "[I] filed a petition [on behalf of OGGI] . . . in August 1985." In addition, paragraph "3" of such affidavit claims that the former State Tax Commission acknowledged receipt of the petition via placing a "stop" on collection of the assessment at issue on October 10, 1985 (a date prior to

the October 17, 1985 Tax Appeals Bureau indate stamp on the petition). Included with petitioner's documents was a copy of a Division accounts receivable printout reflecting the October 10, 1985 stop on collection activities for the subject assessment.

#### CONCLUSIONS OF LAW

A. This case has proceeded by petitioner's initiation of a motion for default based upon alleged untimely service of an answer by the Division. In response, the Division opposed such motion, and also brought what it termed to be a cross motion for dismissal, alleging that the petition had not been timely filed and that the Division of Tax Appeals was without jurisdiction to hear the case. It is true that petitioner's default motion was commenced and all papers in connection therewith had been filed before the Division's brought its "cross" motion to dismiss. Notwithstanding these procedural circumstances, however, it is appropriate to address the Division's dismissal motion first, for the same presents a subject matter jurisdictional hurdle. In this regard, the Tax Appeals Tribunal has specifically held that the issue of a timely petition is jurisdictional in nature and may be raised at any time, by any party, or by the adjudicating body, and may not be waived (Matter of Malpica, Tax Appeals Tribunal, July 19, 1990).<sup>7</sup> Accordingly, before determining whether an answer was timely filed, it is first necessary to

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<sup>7</sup>Though cast as a cross motion, the Division's challenge could properly have been brought independently at any time, in accord with Matter of Malpica (supra).



address whether the petition protesting the notice of determination at issue was timely filed.

B. Where, as here, the Division seeks to deny a taxpayer a hearing on the basis that a petition has not been timely filed, the Division is required to establish when it mailed the notice being challenged (see, Matter of Malpica, supra). Accordingly, it is necessary to review the evidence relating to the Division's issuance (i.e., mailing) of the notice of determination to petitioner. Sufficient proof of mailing has been held to consist of evidence describing a standard or regular procedure for the issuance of such notices together with evidence to show that such procedure was followed with respect to the notice in question (see, e.g., Matter of Katz, Tax Appeals Tribunal, November 14, 1991; Matter of Rosen, Tax Appeals Tribunal, July 19, 1990; Matter of T. J. Gulf v. State Tax Commn., 124 AD2d 314, 508 NYS2d 97, 98). In this case, the Division's proof includes affidavits from two individuals with specific knowledge of the Division's mailing procedures. These affidavits describe such procedures, identify the Division's accompanying certified mail record, and describe how this mailing record evidences that the notice at issue was mailed to petitioner on May 29, 1985. The accompanying documents, including both the Form AU-372.1 and P.S. Form 3877, are completed in their entirety and are, in every respect, consistent with each other and with the information shown on the face of the notice. In sum, the evidence suffices to establish that the date of mailing of the notice in question was May 29, 1985 (see, Matter of Davidson, Tax Appeals Tribunal, March 23, 1989).

C. With regard to the foregoing, petitioner does not argue or allege that the notice was not properly mailed on May 29, 1985 or was not received thereafter in due course. Given proper mailing of the notice and no allegation or evidence of nonreceipt, leaves petitioner under the burden of establishing that a petition was filed within 90 days of the May 29, 1985 issuance date of the notice of determination (Tax Law § 1138[a][1]; Matter of Sipam, Tax Appeals Tribunal, March 10, 1988). Ninety days from the May 29, 1985 issuance date fell on Thursday, August 27, 1985.

D. As a starting point, delivery of the petition has been established. While the Division notes that the petition was not formally acknowledged until March 10, 1992, the Tax Appeals Bureau indate stamp establishes delivery at least as early as October 17, 1985. However, such date falls well beyond August 27, 1985, the 90th day after May 29, 1985. Thus, the question becomes whether the balance of the evidence establishes that the petition was filed not only before the October 17, 1985 stamped indate, but more specifically on or before August 27, 1985.

E. As discussed, this matter has proceeded by way of motion and cross-motion, the latter of which, if granted, will have the effect of dismissing the petition and precluding any proceedings on the merits. Thorough review of the record as it exists at present reveals the same to be potentially incomplete and thus unsatisfactory for purposes of issuing an order the effect of which would finally determine the case. Most specifically troubling in this regard is the absence of the envelope in which the petition was mailed.<sup>8</sup> While the envelope may have been

lost, misplaced or (inadvertently) destroyed and thus is unavailable, it is also possible that the envelope simply has not, through oversight, been included with the motion papers. To this end, it is noted that the petition forms in the record are photocopies and that an original ink-signed

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<sup>8</sup>Petitioner takes the position that the petition was filed on June 25 1985, based on the statement in Mr. Stevralia's November 5, 1992 affidavit that the petition was "mailed" on such date (see Finding of Fact "18"). None of the documents provide a description of the method of mailing (e.g., certified, registered, ordinary). There is no description of the usual or regular procedure by which mailings were made by petitioner's former representative, and it is not known whether the alleged mailing was made by petitioner's former representative himself or by other persons. Hence, in the strictest sense, the evidence does not establish that the petition was in fact filed by mail. It is possible that some other means of filing, such as hand delivery, might have been used and that there would be no envelope or would have been no postmark affixed to an envelope. However, it is most reasonable to accept that the petition was mailed, as claimed, given that the petition indate stamp does not indicate hand delivery and that petitioner's former representative makes no claim of hand delivery. Further, since there is no evidence or claim of certified or registered mailing, it is assumed at this stage of the proceedings that the petition was mailed via ordinary mail.

petition might include an attached mailing envelope. Submission of the envelope, if available, should determine the date of mailing and, in turn, resolve the issue of timeliness. Also troubling is the lack of specificity regarding the method and procedure by which the petition was mailed, as well as certain inconsistencies in the evidence regarding the same. For example, petitioner claims that its former representative, James Stevralia, prepared, signed and timely mailed the petition on June 25, 1985. Petitioner relies on Mr. Stevralia's November 5, 1992 affidavit which, in turn, relies most directly on computerized time billing records as described. However, the affidavit simply states the petition was "mailed", while the time records state "sales tax petition" (June 10, 1985) and "tax return OGGI - protest" (June 25, 1985). Neither of such latter entries specifies that mailing occurred on such dates, thus leaving either or neither of such dates as possible mailing dates. Further, the November 5, 1992 affidavit claims a June 25, 1992 mailing, while Mr. Stevralia's earlier September 22, 1985 affidavit claims an August (date unspecified) mailing (see Finding of Fact

"21"). This inconsistency, possibly resulting from Mr. Stevralia undertaking a more detailed review of time records before making his later affidavit, is not addressed by petitioner. In the same manner, the power of attorney form accompanying the November 5, 1992 affidavit reflects a June 19, 1985 date of execution (consistent with the statements in that affidavit), whereas the power of attorney included with the petition is dated as executed on May 9, 1984 (see Finding of Fact "4"). This inconsistency might be explainable as execution of additional or separate power of attorney forms by petitioner on June 19, 1985 (with regard to representation before the Tax Appeals Bureau of the former State Tax Commission), versus prior power of attorney forms executed on May 9, 1984 (for purposes of representation during then ongoing audit proceedings before the Division). However, without evidence to support this assumption, the same constitutes simply another unexplained inconsistency. In sum, the documents relied upon by petitioner are nonspecific with regard to the method of mailing and inconsistent with regard to the date of mailing. The Tax Appeals Bureau indate stamp makes clear that the

petition was, in fact, received at Tax Appeals at least by October 17, 1985 (though not necessarily received at Tax Appeals directly by mail). It is further troubling that, as petitioner notes, a "stop" on collection activities for this case was placed on the Division's accounts receivable system on October 10, 1985, some one week prior to the indate stamped on the petition. Although it is unexplained why a stop would precede the filing of a petition with the former Tax Appeals Bureau, the same does not constitute proof that petitions were filed (possibly with another Division operating bureau) within 90 days of the date of the issuance of the notices of determination, to wit, by August 27, 1985. Petitioner might offer evidence as to where, in particular, the petition was mailed. In fact, although the October 10, 1985 stop date is still some six weeks after the petition deadline, the same reveals that the Division had some reason to suspend collection activities on this matter and at least raises an inference that the petition was somewhere within the Division prior to the date of the Tax Appeals Bureau indate stamp.

F. This case presents unique facts, and does not involve the more typical circumstance where a petition filed by ordinary mail is not received or, if received after the ninetieth day, includes the envelope from which the relevant dates may be obtained and the appropriate mailing rules (well developed by statute, regulation and case law) may be applied. Since, if granted, the dismissal motion is, in end result, the same as a motion for summary judgment, the motion should not proceed where it appears the parties have not adequately developed the record and that necessary factual information should be provided. By analogy, summary judgment is denied where material triable issues of fact exist. In the same spirit, the subject motion to dismiss should be denied and the parties should be entitled to more fully develop the evidentiary record on the question of timeliness. More specifically, considerations of fairness and of the unique facts herein require that the matter be scheduled for hearing on the issue of timely filing of the petition, thus affording the Division an opportunity to submit (or admit the unavailability of) an original petition and envelope while also affording petitioner an opportunity to provide additional detail regarding mailing of the petition. If the parties do not

desire to appear they may, alternatively, elect to submit such evidence on timeliness for inclusion in the record herein.<sup>9</sup>

G. In view of the foregoing, petitioner's motion for default based upon late filing of an answer is denied, without prejudice, however, to renew the same if the jurisdictional issue is resolved in petitioner's favor.

H. Petitioner's motion for default is denied, the Division's cross motion to dismiss is likewise denied and, absent agreement to submit evidence on timeliness in accordance herewith within 30 days of the date hereof, the matter is to be scheduled for hearing on the issue of timeliness of the petition.

DATED: Troy, New York  
March 18, 1993

/s/ Dennis M. Galliher  
ADMINISTRATIVE LAW JUDGE

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<sup>9</sup>This decision is not reached without regard to the possibility that there may be no more evidence available to either party regarding mailing, in which case the matter must be decided on the existing evidence. However, after careful consideration, the concept of fundamental fairness, the possibility of the existence of additional relevant (if not determinative) evidence, and the fact that proceeding by motion herein may have contributed to a less than completely developed record, taken together, outweigh considerations of delay and militate in favor of the result described above. These considerations are especially important given the nature of the motion and its potential resolution upon the record as it exists (see, Matter of Toohey, State Tax Commn., May 29, 1985 [TSB-H-85(128)I]).